SJR

31

Alaska State Legislature

During Session
P.O. Box V
Juneau, Alaska 99811
(907) 465-2828

During Interim
3111 C Street, Suite 510
Anchorage, Alaska 99503
(907) 561-2040

Senator Virginia Collins

SJR 31

SPONSOR STATEMENT

SJR 31 provides a means to bring all branches of state government under one Commission on Public Standards, COPS, with a uniform set of standards of conduct for public officials with enforcement powers. Currently, Alaska Statutes provide for three separate and distinct methods of monitoring a public official's conduct.

SJR 31 allows the voters of Alaska a chance to decide the kind of ethics and campaign oversight the State of Alaska should pursue. In 1989 I introduced legislation very similar in concept.

A common feature of the public interest model bills is an independent commission with authority to enforce violations of a standards of conduct code as well as campaign financing statutes. Only a constitutional amendment can accomplish the ultimate goal of independence.

Article II, Section 12, Rules, of Alaska's constitution states in part that each house of the Legislature determine the fitness of its members to serve:

> "...Each is the judge of the election and qualifications of its members and may expel a member with the concurrence of two-thirds of its members...."

Clearly, the only way an ethics commission can enforce its recommendations against sitting legislators is to change the constitution. The time has come to standardize, monitor, and administer a uniform code of conduct for all public officials. An autonomous commission free from political as well as budgetary pressure is much preferable to our current system of oversight.

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 2/19/92 FURTHER: Judiciary

Date of 5-Day Notice: 20 Feb 92
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 20 Feb 92

HES Committee considered SB 441

Exempting the University of Alaska from the administrative adjudication provisions of the Administrative Procedure Act; efd.

and recommends:

[ ] replace with ________ CS ________________ (____)

[ ] attaches amendment(s)

[ ] same title
[ ] new title
[ ] technical title change (HB only)

[ ] adopts ____________________ Letter of Intent

[ ] further referral to the ____________________

[ ] do pass

[ ] do not pass

[ ] no recommendation

[✓] individual recommendations

NEW FISCAL NOTES: Dept/Date

[ ] **zero** fiscal notes ____________________

[ ] fiscal notes ____________________

[ ] **appropriation**--no fiscal note

PREVIOUS FISCAL NOTES: Dept/Date

[✓] **Governor's bill** with fiscal notes:

zero fiscal notes U of A 2-19-92

fiscal notes ____________________

DO PASS:

OTHER RECOMMENDATIONS:

[signature] No rec
[signature] No rec
[signature] No rec

[signature]

Chair: Signature and Recommendation

Alaska Commission on Judicial Conduct
310 "K" Street, Suite 301, Anchorage, Alaska 99501
(907) 272-1033 In Alaska 800-478-1033 FAX (907) 272-9309

Marla N. Greenstein
Executive Director

March 13, 1992

MEMORANDUM

TO: Senator Halford
Chair, Senate Judiciary Committee

INFO: Senator Collins

FROM: Marla N. Greenstein
Executive Director

RE: SJR No. 31

In an effort to create a state ethics commission that would extend to legislative and executive officials, this proposed Senate Joint Resolution seeks to accomplish this goal by also abolishing the existing constitutional commission that regulates the ethical conduct of state court judges. While the fundamental idea of a single state commission governing the ethical conduct of officials of all branches of government, may on its surface appear reasonable, there are historical reasons and fundamental legal concepts that do not support this approach.

The Commission on Judicial Conduct was established by constitutional amendment (as the Judicial Qualifications Commission) in Alaska, at a time when these commissions were being established across the country. Today, all fifty states and the District of Columbia, have a government commission devoted to addressing the ethical conduct of judges. In fifty of those fifty-one jurisdictions, the agency is devoted solely to the ethical conduct of judges. These include states that have established legislative and executive ethics commissions. The one state that does not concern itself exclusively with judges is Ohio, where attorneys are

included under the same commission, though governed by different legal provisions. The rational for the single commission in Ohio is that both judges and attorneys serve under the authority of the Ohio Supreme Court, and, therefore, can be administered under a single court related agency. Once, again, even this close connection is a minority position.

The reasons behind a unique state commission charged with disciplining judges are many. First, the original commissions had their authority challenged by the judges they sought to discipline. They challenged the process by claiming that to preserve judicial independence, the only sanction could be legislative impeachment for criminal conduct. These arguments failed as various state supreme courts reasoned that as long as the judicial conduct commissions were judicial branch agencies and were directly and uniquely related to the courts inherent powers to supervise its own, there was no violation of the separation of powers and no infringement on the independence of the judiciary. In fact, several cases refer to judicial conduct commissions as an "arm of the court" and emphasize that it is an agency of the judicial branch.

Second, judicial conduct commissions are charged with enforcing a unique code that applies solely to judges. Judges are restricted to an extent not required of other public officials. For example, judges are prohibited from engaging in any political activity, cannot fundraise on behalf of any organization, and are limited in how they handle their financial and business affairs. If there were one state-wide commission to enforce official ethics, it would need to enforce an entirely different, and much stricter ethical code for judges.

Third, there is an entire body of case law in the area of Judicial Ethics that requires knowledge and expertise. In the twenty-five years that judicial conduct commissions have been in place, they have generated thousands of cases, advisory opinions, and sanctions, that interpret the Code of Judicial Conduct. There are national associations devoted to this unique field and comprised of those who practice exclusively in this unique area of the law. If a commission were to be created that would also be responsible for enforcing other ethics codes, there would need to be at least one full-time staff attorney with the necessary expertise to apply the Code of Judicial Conduct.

In summary, judicial conduct commissions have been institutionalized nationally as unique state agencies in the judicial branch that are charged exclusively with enforcing the Code of Judicial Conduct. This structure seems to be required under fundamental constitutional concepts of separation of powers and an independent judiciary. Further there are practical requirements for a separate and unique state agency that enforces judicial ethics. Because judges must comply with a strict ethics code that does not apply to other public officials, staff expertise in this unique area of law is essential to a fully functioning conduct commission.

1445 Responses Over

1992 LEGISLATIVE SURVEY

Health Care

Are you satisfied with your personal health care coverage?

Yes - 62.5% No - 35.9% Other - 1.6%

Do you favor replacing the current private and public health care systems with a universal health care system that would require an increase in state spending?

Yes - 31.1% No - 62.8% Other - 6.1%

Would you contribute a portion of your Alaska Permanent Fund Dividend to participate in a universal health care system?

Yes - 30.9% No - 63.8% Other - 5.3%

Operating Budget

85% of the state budget is financed by oil revenues which are expected to decrease over the next decade. At current spending levels, a revenue shortfall of between $300 and $500 million is expected in 1993. Governor Hickel has proposed an increase of 4.3% (over $100 million) in the state operating budget for FY 93. Do you support this increase?

Yes - 14.8% No - 80.8% Other - 4.4%

Capital Budget

Do you favor using any of the estimated $708 million of the Alaska Permanent Fund's Earning Reserve Account to pay for a capital budget for statewide construction projects?

Yes - 21.7% No - 74.6% Other - 3.7%

Boot Camps

Do you favor requiring juveniles who violate criminal law to be placed in boot camps that stress academics, physical labor, and structured discipline?

Yes - 86.9% No - 8.7% Other - 4.4%

Subsistence

The Governor's Subsistence Advisory Council is working on a plan that would create a permit system for subsistence users. It would give an urban resident a process to prove he or she is a subsistence user. Do you favor having a permit system for subsistence users?

Yes - 64.6% No - 25.5% Other - 9.9%

Motor Fuels Tax

Do you favor increasing the tax on motor fuels if the monies from the tax are dedicated to the maintenance of roads, airport facilities, ports, and harbors?

Yes - 68.9% No - 29.0% Other - 2.1%

(Over)

SENATOR VIRGINIA COLLINS & REP. LARRY BAKER

Ethics

Currently the legislative, executive, and judicial bodies have separate ethics rules and enforcement. Do you support the creation of one, uniform ethics code for all three branches of government?

Yes - 85.3% No - 9.2% Other - 5.5%

Closed Primary Elections

A closed primary restricts who can vote for members of parties qualified for the ballot. A recent court decision now allows parties to close their primaries or have modified closed primaries if they choose to do so. The Republicans, Democrats, and Green parties have now changed their party rules to incorporate this court decision. Do you support a closed primary system?

Yes - 26.2% No - 67.4% Other - 6.4%

Legislative Reform

The current legislative session limit is 121 days. Do you support a 90-day session limit?

Yes - 60.4% No - 34.7% Other - 4.9%

There are no limits to the number of terms a state legislator may serve. Do you support limiting terms of state legislators to eight consecutive years in the same office?

Yes - 78.2% No - 19.6% Other - 2.2%

The Initiative Process

Should the Alaska State Constitution be amended to allow the voters to propose constitutional amendments by initiative petition (gathering enough signatures to place a question on the ballot)?

Yes - 68.8% No - 26.3% Other - 4.9%

Name the Issue Most Important to You

What is the ONE most important issue the Legislature needs to address this session?

Budget - 49.8% Education Programs - 10% Health Care - 9.5%

How to Reach Virginia & Larry

Senator Virginia Collins

1-800-770-2828

Fax: (907) 465-4779

Representative Larry Baker

1-800-478-4931

Fax: (907) 465-3153

Don't forget to mark your calendar for Saturday, March 28, our next constituent meeting date.

Please join us at Willow Crest Elementary from 3-5 p.m. or at Tudor Elementary from 1 - 3 p.m.

Ethics in the Judicial Branch

Stephan W. Stover, Court Administrator, The Supreme Court of Ohio

> *Wise and virtuous men have thought and reasoned very differently respecting government, but in this they have at length very unanimously agreed, that its powers should be divided into three, distinct, independent Departments — the Executive, Legislative and Judicial.*

With these words, John Jay outlined the basic structure of our system of government — three branches, separate but equal.

Last year, we celebrated 200 years of the federal judiciary. The first session of the United States Supreme Court was held on February 1, 1790, in a small room on the second floor of a small commercial building with a grand name — the Royal Exchange Building — across from the Fulton Fish Market near the waterfront in New York City, then the nation's capital. Of President Washington's first six nominations to the Court, one refused, one accepted but never attended, and John Jay, the first chief justice, gave only limited service because he did not think that the Court would ever amount to much.

The Court and the judicial system have grown and flourished, and have played a significant and ever-increasing role in bringing to life what the framers of the Constitution had envisioned — a balanced government, designed to stand the test of time. It is the judiciary that has articulated the fundamental principles of separation of powers. Although it is called the "weakest branch," and the "least understood branch" of government, with "neither the sword nor the purse," the judicial branch has been able to hold its own, sometimes with remarkably independent thinking.

During the first days of the United States Supreme Court, the justices lived together in the same house in Washington because accommodations were too limited and unsatisfactory for their wives to be with them. The justices frequently discussed their cases in this informal setting, and Saturday was their formal "consultation" day.

When someone expressed concern about the justices drinking too much, Chief Justice Marshall decided that they would not drink on "consultation" day — 'that is, except when it rains."

On the next consultation day, Chief Justice Marshall asked Justice Story to step to the window and see if there was any rain, and he sadly reported that there was no sign of rain. Chief Justice Marshall then said, "Justice Story, I think that is the shallowest and most illogical opinion I have ever heard you deliver; you forget that our jurisdiction is as broad as this Republic, and by the laws of nature, it must be raining someplace in our jurisdiction. Waiter, bring on the rum."

As our tripartite system of government has evolved over the last 200 years, the role of judiciary, and the importance of separation of powers and an independent judiciary have become part of the very fabric of that system. Today, judicial authority reaches every corner of our society. Judges peacefully resolve disputes and interpret and apply the laws, defining rights, and responsibilities, determining the distribution of resources, and, in some cases, directing the actions of officials in other branches of government. It is axiomatic that judges must exercise these functions with integrity, impartiality, and independence. According to Justice Cardozo, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."

Judicial Ethics

Ethics laws and codes have evolved in all three branches of government. An article in the April, 1989, *Guardian* outlines, compares, and contrasts, ethical standards in each of the three branches of government. In this article, we will focus on the judicial branch, with emphasis on several important recent events. First, the ABA has adopted a new *Model Code of Judicial Conduct*, which includes significant changes. Second, the American Judicature Society has conducted the first survey in more than ten years of judicial conduct organizations throughout the United States. Third, states have begun to promulgate codes to conduct for nonjudicial court employees.

THE CODE OF JUDICIAL CONDUCT

In 1906, Roscoe Pound first called for formalized standards of professional conduct in the legal profession in his speech, "The Causes of Popular Dissatisfaction with the Administration of Justice." In 1908, the American Bar Association adopted *Canons of Professional Ethics* governing the conduct of lawyers, although there were no separate standards for judges.

The history of the canons of judicial ethics has an interesting twist. It appears that they grew out of the "Black Sox" scandal in which members of the Chicago White Sox baseball team were alleged to have "thrown" the 1919 World Series to the Cincinnati Reds. Baseball officials hired United States District Court Judge Kenesaw Mountain Landis as the "National Commissioner of Baseball Associations," to clean up baseball. The problem arose when Landis insisted upon remaining on the bench, receiving the princely salary of $7,500 per year for serving as a judge, while accepting $42,500 to serve as the so-called "czar" of baseball. As a result of the public outcry, the 1921 American Bar Association adopted a resolution

of censure and appointed a committee to propose standards of judicial ethics.

In 1924, the American Bar Association approved the original *Canons of Judicial Ethics*, drafted by a committee chaired by Chief Justice William Howard Taft. The thirty-six canons were intended to establish standards of conduct rather than an enforceable set of rules, and have been described as a "curious mixture of generalized, hortatory admonitions and specific rules of standards of proscribed conduct."

In response to concerns over the original 1924 Canons, the American Bar Association, in 1972, promulgated a *"Model Code of Judicial Conduct,"* composed of seven canons. The *Model Code* has been adopted in whole or in part by forty-seven states, the District of Columbia, and the Federal Judicial Conference. According to most scholars, the widespread adoption of the *Model Code* provides a degree of uniformity and forms the foundation for a national body of law concerning judicial conduct.

States have begun to promulgate codes of conduct for nonjudicial court employees.

1990 American Bar Association Model Code of Judicial Conduct

On August 8, 1990, the American Bar Association House of Delegates approved a new *Model Code of Judicial Conduct*. The new *Code*: 1) makes clear that the *Code* is mandatory rather than aspirational; 2) expands the commentary and adds a terminology section to provide more specific guidance; 3) prohibits membership in organizations that practice discrimination; 4) clarifies the rules regarding *ex parte* communications; 5) consolidates three canons regarding extra-judicial activities; and 6) clarifies the canon regarding political activity.

The commentary is extremely important. The *Code of Judicial Conduct* and the *Code of Professional Responsibilities* for lawyers appears to be the only ethics codes that provide a commentary to outline the purpose of and policy underlying each Canon, and provide an explanation of each requirement. The commentary also provides important guidance in the application of the *Code*, and to a certain extent, mitigates the nominal use of advisory opinions in the judicial branch.

Canon 1 provides: **A judge shall uphold the integrity and independence of the judiciary.** The substance of this Canon is unchanged, except to distinguish mandatory and aspirational standards.

Canon 2 states: **A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.** Over the years, there has been considerable criticism of the portions of the *Code* relating to membership of judges in organizations that practice discrimination. The 1990 version provides a clear standard, prohibiting a judge from "holding membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin." According to the commentary, the provisions are intended to balance "a judge's right of private association with the need of the public to be assured that every judge both gives the appearance of impartiality and is capable of fair and unbiased trial conduct and decisions."

The commentary explains that in order to determine "invidious discrimination," one must look at how the organization selects members and other factors; an organization discriminates invidiously if it arbitrarily excludes members on the bases set forth in the rule. Although not a violation of the rule, arranging meetings in discriminatory facilities may violate the requirement that a judge "promote . . . public confidence in the integrity and impartiality of the judiciary." Judges are given time to disassociate themselves from such organizations; either the organization must change its admission policies within one year or the judge must resign.

Canon 3 provides that **a judge shall perform the duties of judicial office impartially and diligently.** According to the committee report, "the 1972 Code required substantial revision to eliminate ambiguities and to provide more specific guidance."

As revised, the canon has six sections: 1) judicial duties in general; 2) adjudicative responsibilities; 3) administrative responsibilities; 4) disciplinary responsibilities; 5) disqualification; and 6) remittal of disqualification.

The 1990 *Code* adds provisions to address the affirmative duty of a judge to hear matters, and to prohibit improper comment by a judge on a jury verdict. Another new provision mandates that a judge require lawyers to refrain, within the limits of legitimate advocacy, from manifesting bias against parties, witnesses, counsel or others, on the basis of race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status.

The provision on *ex parte* communications is amended to permit, in certain circumstances, and with appropriate restrictions, those communications necessary for non-substantive scheduling, administrative purposes, or emergencies, provided there is no advantage to one party and the other party is notified of the communication. The new canon also permits a judge to contact parties and their lawyers separately to encourage mediation and settlement or "as expressly authorized by law."

The provision on disqualification is clarified and strengthened to give better guidance and obviate the need for disqualification when a judge's financial interest in a pending matter is *de minimis* and would not affect impartiality. The new *Code* also clarifies and strengthens the provision concerning reporting of

Continued on page 24

Lobbying

Connecticut

Connecticut Retailers Pay $50,000 Fine for Violating State's Lobbying Statute

The Connecticut Retail Merchants Association has paid a $50,000 fine for widespread violations of the state's lobbying laws, including failure to disclose excessive gifts and lavish entertaining of Connecticut lawmakers.

Under Connecticut law, members of the legislature are not permitted to accept gifts worth more than $50 in a year from a lobbyist.

Illinois

Illinois Legislation Seeks to Amend Lobby Law

HB 326 (Matijevich) would create the Lobbyist Regulation Act of 1991. It requires the licensing of lobbyists and also imposes restrictions, reporting requirements and penalties. It repeals the old Lobbyist Registration Act. This entire act would be administered by the State Board of Elections, replacing the Secretary of State. The bill sets limits as to when contributions may be made by lobbyists to candidates for elective state office.

Indiana

Hogsett Seeks to Tone Down Laws on Lobbyist Financial Disclosures

Secretary of State Joseph Hogsett proposed new lobbying disclosure laws that would drop some of the more controversial requirements he currently enforces.

His proposal would drop the attorney general requirement that medical reimbursements paid by insurance companies to legislators and normal banking relationships between financial institutions and legislators be reported.

However, Hogsett would require four reports a year from lobbyists instead of the current two. Also, he wants the fees paid to legislatures by lobbyists to be disclosed.

New Jersey

Ad Hoc Commission Calls for Lobbying Reform

The Ad Hoc Commission on Legislative Ethics and Finance calls for legislation that will require all expenditures by lobbyists on legislators, the governor and staff to be reported.

It further recommends that the New Jersey Election Law Enforcement Commission have total jurisdiction over lobbying regulation and that lobbyists file on a quarterly basis with ELEC. Currently, ELEC shares jurisdiction with the attorney general.

The Commission also recommends an increase in ELEC's fine scale and strongly endorsed strengthening ELEC through an increase in its appropriation.

Vermont

Secretary Of State Douglas Calls for Lobbying Reform

Secretary of State Jim Douglas told the Vermont Legislature that the State's new lobbyist law needs revision to ensure more meaningful disclosure. The new statute was passed in 1990 and requires more specific disclosure than before. Douglas says the new law is an improvement, but vague definitions as to what constitutes lobbying have resulted in inconsistent filings.

Ethics . . .

from page 6

lawyer or judge misconduct to expressly require a judge to report serious violations while retaining discretion to take appropriate action in less serious matters. Finally, a new provision is added to address the administrative responsibilities of supervisory judges.

New Canon 4 provides: **A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.** The *1972 Code* had three sections dealing with extra-judicial activities. Canon 4 provided that "a judge may engage in activities to improve the law, the legal system, and the administration of justice." Canon 5 stated that "a judge should regulate his extrajudicial activities to minimize the risk of conflict with his judicial duties," and Canon 6 provided that "a judge should regularly file reports of compensation received for

extra-judicial activity." Because all three canons related to extra-judicial activities, the new *1990 Code* combines them in a new, more specific, Canon 4. According to the commentary, former Canon 4 had been the subject of conflicting judicial ethics opinions; the purpose of the revised provisions is to distinguish those fund-raising activities that lend themselves to abuse from those that do not." In addition, the provisions on financial activities are amended to permit limited participation in a family business, as long as it is consistent with the primary obligations of the judge, and to permit uncompensated personal legal consultation with the judge's family. Provisions "relating to judges' spouses and family members are revised to recognize the reality that such family members often act independently of the judge."

The new Canon 5 provides that **a judge or judicial candidate shall refrain from inappropriate political activity**. New Canon 5 replaces former Canon 7, and is restructured to address the conduct of all judges and candidates for judicial office regardless of the method of selection. New provisions extend the length of time allowed for pre- election fund-raising, remove certain restrictions on political speech and other political conduct, and expressly prohibit incumbent judges from engaging in any political activity that is not conducted on behalf of measures to improve the law, the legal system, or the administration of justice, or that is "not otherwise authorized by the *Code* or expressly authorized by law."

In summary, the *1990 Model Code of Judicial Conduct* makes constructive changes in the code. The most important change is that the code is now clearly mandatory rather than aspirational. The clarification of many of the provisions and the expanded commentary will make the code easier to interpret and apply. A few of the amendments recognize changes in societal norms over the last eighteen years.

JUDICIAL CONDUCT ORGANIZATIONS

Virtually all states have some form of a judicial conduct organization to administer, interpret, and enforce codes of judicial and legal conduct. The American Judicature Society sponsors the Center of Judicial Conduct Organizations, and their relationship is similar to that of the Council on Government Ethics Laws and The Council of State Governments.

In 1980, the American Judicature Society published *Judicial Conduct Organizations*, 2nd Edition. The 1980 study included eight tables comparing and contrasting judicial conduct organizations on the following topics: 1) commission authority; 2) citations for commission governing provisions: 3) commission membership; 4) grounds for discipline, removal, and retirement; 5) judicial disciplinary sanctions; 6) confidentiality of commission proceedings; 7) disposition of complaints and 8) efforts to make the commission visible. The book also included information on commission personnel and budget. This fall, the American Judicature Society completed an update of the study, and portions are included in the *COGEL Blue Book*, 8th edition, 1990.

Overall, the changes in judicial conduct organizations over the last ten years have been extensive and significant. The changes are not always reflected in charts and tables, but are more often seen in rules of procedure. It is an ongoing process; in Ohio, we seem to have changes in the disciplinary rules each year, primarily fine-tuning procedural standards to reflect recent changes in statutory and case law and practice. Suffice it to say this is a complex area, and there will continue to be changes.

There have been modest changes in the structure of state judicial conduct organizations over the last ten years. There have been constitutional changes in Arizona, Arkansas, California and Washington. In Arkansas, there was a general reorganization of the disciplinary structure. In Washington, there were changes in membership, and the procedures were formalized and made more public. There were major revisions in Ohio in 1987, but we still have an unusual structure, with twenty-eight members on the disciplinary board.

The most significant change has been in the area of confidentiality. In general, the trend has been to end confidentiality earlier in the process, based on the notion that confidentiality has harmed public confidence in the disciplinary process and the judicial system. There remains a strong minority view that there is a need for confidentiality to protect "whistle blowers" and court employees.

There have been a few changes in the grounds for discipline. Beginning in 1980, there has been increased recognition and emphasis on alcohol and drug abuse. The Supreme Court of Ohio has adopted a continuing judicial and legal education requirement for training in ethics and substance abuse. Recently, provisions were added to the disciplinary procedures to permit a lawyer to be placed on probation if alcohol or drug abuse contributed to the misconduct. Nationally, substance abuse is not a defense, although it may be considered as mitigating factor. There remains a split among states as to whether substance abuse is a mitigating factor for the most serious offenses, including conversion of trust funds or stealing clients' money. However, it is generally considered a mitigating factor in minor offenses.

Several other changes deserve mention. There have been recent attempts to expand the range of sanctions available to disciplinary bodies, particularly at the preliminary levels, to give judicial conduct committees greater flexibility. There is an increased use of warnings for judges, which often are "on the record," but not public. There has also been increased use of masters or subcommittees to gather facts, because the larger committees and courts simply do not have the time. This is similar to the use of magistrates, referees or hearing officers in judicial and administrative hearings. Finally, it should be noted that the judicial branch is not immune to problems with funding. As financial problems of states increase, the judicial branch has had to accept its share of budget cuts, and

this, to some extent, has affected the judicial and lawyer discipline systems.

Perhaps the most significant changes in the judicial discipline systems will occur in the future. It remains to be seen whether and to what extent the new *ABA Model Code of Judicial Conduct* will affect state judicial systems over the next ten years.

CODES OF CONDUCT FOR NONJUDICIAL COURT EMPLOYEES

Traditionally, nonjudicial court employees have been subject to a wide range of ethical standards, including the *Code of Judicial Conduct* for judges, the *Code of Professional Responsibility* for lawyers, and state ethics laws. In some cases, ethical standards are outlines in personnel procedures and even collective bargaining agreements. Over the last several years, codes of conduct for court administrators and other nonjudicial court personnel have emerged as an important new trend.

Nonjudicial court employees play a significant role in the judicial process. While they are not involved directly in deciding cases, they often are the most visible representatives of the judicial system because they are the primary contact with the public. One of the most important aspects of the job of a court employee is to serve as liaison between the courts and the public — to assist the public, both litigants and attorneys in the procedural aspects of having cases resolved, and to provide information to the public. Court employees also assist judges in the administrative aspects of court operation.

Standards of conduct are important in all of these areas. The breadth of the responsibilities and the fact that they are often subject to so many different standards of conduct suggests the need to combine the standards in a single code of conduct. This is particularly true because the greatest value of these codes is to provide court employees with notice of the ethical standards that are applicable to them as in ethics laws, the existence of a standard of conduct and mechanisms for advice and enforcement are perhaps the greatest deterrent to problems and violations.

In general, nonjudicial court employee codes of conduct should apply to virtually all employees of the court system. Specific examples include: administrators, court clerks, bailiffs, court reporters, secretaries, records keepers and data processing personnel. Of course, law clerks are in a unique position close to the judge. However, virtually all employees are subject to some ethical pressures, from something as small as the box of chocolates during the holidays, to "special" requests from lawyers who need something done quickly, and entreaties to breach court confidentiality.

Our research reveals that thirty-eight states and the District of Columbia have established some type of standard of conduct, either by state statute, codes, application of the *Code of Judicial Conduct* or *Code of Professional Responsibility* to court employees, court rules, personnel policies or collective bargaining agreements. In addition, the National Association for Court Management, the National Conference of Appellate Court Clerks, the federal courts and the National Shorthand Reporters Association have established codes. There is a wide range, a patchwork of standards. On the positive side, there is a strong trend toward the adoption of comprehensive codes of conduct for nonjudicial court employees.

There are a variety of substantive prohibitions in the various statutes, codes, personnel policies and contracts that apply to court personnel. They include conditions on employment, such as prohibitions against: 1) political activity; 2) practicing law while employed by a court; and 3) outside employment, unless the outside employment: (a) does not interfere with the performance of duties, (b) does not constitute a conflict of interest and (c) does not reflect adversely on the court. There also are specific ethical prohibitions against: 1) the appearance of impropriety or activities that reflect adversely on the court; 2) misuse of confidential information; 3) nepotism; 4) conflicts of interest; 5) accepting or soliciting gifts; 6) improper influence, including use of position to influence the assignment of cases, to favor a litigant, or to influence other employees; and 7) falsification or alteration of documents. In addition, there are a few general provisions that require court employees to "be diligent in the performance of duties," "maintain personal integrity," and participate in continuing education or professional development. Enforcement structures and sanctions vary as widely as the prohibitions.

This clearly is an emerging area in the law. Standards of conduct are appropriate and necessary, and there is a trend toward adoption of comprehensive codes. In fact, the president of the Conference of State Court Administrators has been asked to appoint a committee to study nonjudicial court employee codes of conduct and develop a model code for consideration by member states.

CONCLUSION

The history of the ethical codes in the judicial branch of government extends throughout most of this century, and raises many thought-provoking issues. The next ten years should prove very interesting, especially as state judicial codes evolve in light of the *1990 ABA Model Code of Judicial Conduct*, and the emergence of employee codes of conduct.

Sources

1990 ABA Model Code of Judicial Conduct. Ohio Supreme Court Code of Conduct. Ozar, David T., Kelly, Cynthia, and Begue, Yvette, "Ethical Conduct of Nonjudicial Court Employees: A Proposed Model Code" 73 *Judicature* 126 (1989). *see also 71 Judicature* 262 (1988). Shaman, Jeffrey M., Lubet, Steven, and Alfini, James J. *Judicial Conduct and Ethics* (1990). Stover, Stephan W. and Dove, Richard A. "Ethics in the Judicial Branch" *COGEL Guardian*, April 30, 1989. □

Council on Governmental Ethics Laws

April 30, 1991

COGEL GUARDIAN

"Who is to guard the guardians?" — Juvenal

FEC Adopts New Rules on "Soft Money"

John Warren McGarry
Chairman, Federal Election Commission

The Federal Election Commission (FEC) recently prescribed new rules that regulate the use of "soft money" for activities that jointly influence federal elections (Presidential, Senate and House) and state or local elections (hereafter we will simply refer to as nonfederal elections for brevity's sake). Soft money generally refers to funds raised outside the strictures of the federal law. The use of soft money to influence federal elections is illegal, even though the funds may be permissible under state law.

Under FEC rules, when party committees and PACs undertake activities that jointly influence federal and nonfederal elections, they must use "hard money," i.e., funds that comply with federal law,[1] to pay for the federal portion of the expense. The new rules provide specific allocation formulas to determine the federal amount.

The rules apply to party committees and PACs that segregate their federal and nonfederal activity by maintaining two accounts: a federally registered "hard money" account and a nonfederal "soft money" account, subject to state law. However, the new provisions — with the exception of the reporting rules — also apply to party committees and PACs that do not have to register or report under federal law because of their limited federal activity.[2]

Because of new payment procedures contained in the new rules, federal accounts registered with the FEC are now required to disclose more information on mixed federal/non-federal expenses than was previously required. This may affect the content of state reports filed by the nonfederal expenses than was previously required. State reports will now show a transfer to the federal account for mixed expenses instead of a direct payment to the vendor. The Commission has alerted state officials that state reports filed by nonfederal accounts may provide less information on mixed federal/nonfederal transactions than previously was the case. (Reporting is discussed in greater detail later in this article.)

Allocation: By Whom? When? What?

FEC rules stipulate that when any party committee or PAC conducts activities that jointly influence both federal and nonfederal elections, the committee must use hard money to pay for the federal portion of the expense. As mentioned above the new rules provide specific allocation formulas to determine what portion of a mixed expense must be defrayed with hard money. Committees are free to pay more than the minimum federal portion with hard money and, in fact, may use hard money to fund the entire activity. If the federal account pays 100% of mixed federal/nonfederal expenses, allocation is not necessary, and the new payment and reporting rules discussed below do not apply. But using soft money to subsidize any federal portion of an expense is illegal.

The regulations list several types of shared federal and nonfederal expenses that must be allocated:

- Administrative expenses — including rent, utilities, office supplies and salaries — must be allocated.
- Costs for generic voter drives must also be allocated. This category includes voter identifications, voter registration and get-out-the-vote drives that urge the public to support a particular party but do not mention specific candidates.
- Expenses for fundraising programs through which the committee collects both nonfederal funds (soft money) and federal funds (hard money) must be allocated.

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